APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-5530

BRETT C. KIMBERLIN,

Appellee,

v.

J. MICHAEL QUINLAN,
DIRECTOR U.S. BUREAU OF PRISONS AND
LOYE W. MILLER, JR.,

Appellants.

Appeal from the United States District Court
for the District of Columbia
(No. 90cv01549)

Argued November 10, 1999 Decided December 28, 1999

Michael L. Martinez argued the cause for appellants. With him on the briefs were *Paul G. Lane* and *Danielle E. Berry*.

Timothy E. Boyle argued the cause for appellee. With him on the brief were *Howard T. Rosenblatt* and *Matthew S. Wild*.

Before: EDWARDS, *Chief Judge*, SILBERMAN and HENDERSON, *Circuit Judges*.

Opinion for the Court filed by *Chief Judge* EDWARDS.

Separate opinion dissenting in part filed by *Circuit Judge* HENDERSON.

EDWARDS, *Chief Judge*: In 1990, Brett Kimberlin brought this *Bivens* action alleging, *inter alia*, that J. Michael Quinlan, formerly the Director of the Federal Bureau of Prisons, and Loye Miller, formerly the Director of Public Affairs for the United States Department of Justice, violated his constitutional rights under the First Amendment. This is the second time that this court has had occasion to hear an appeal in this case. The first appeal followed an order by the District Court denying defendants' motion for summary Judgment on grounds of qualified immunity. *See Kimberlin v. Quinlan*, 774 F. Supp 1 (D.D.C. 1991) ("Kimberlin I").We reversed the District Court, *see Kimberlin v. Quinlan*, 6 F.3d 789 (D.C. Cir. 1993), but the Supreme Court granted *certiorari*, vacated this court's decision in light of *Johnson v. Jones*, 515 U.S. 304 (1995), and remanded the case for further proceedings. *See Kimberlin v. Quinlan*, 515 U.S. 321 (1995). We then remanded the case to the District Court. The trial court then considered and denied defendants' renewed motion for summary judgment on grounds of qualified immunity. In reaching this conclusion, the District Court held that its judgment in the initial proceeding established the law-of-the-case regarding the existence of clearly established law and that this was dispositive of the qualified immunity issue. *See Kimberlin v. Quinlan*, Civ. Act. No. 90-1549, Mem. Op. (D.D.C. Oct. 21, 1998), *reprinted in* Joint Appendix ("J.A.") 24-44 ("*Kimberlin II*").

We affirm the judgment of the District Court on the law-of-the-case issue. In their appeal of *Kimberlin I*, appellants did not challenge the District Court's judgment regarding the clearly established law; thus, the issue was settled as to these parties in this case. And there was no good reason for the District Court to reexamine its judgment when the case was remanded for further proceedings.

The judgment on the clearly established law, however, is not fully dispositive of the issues raised by appellants'

renewed motion for summary judgment on grounds of qualified immunity. The District Court must now determine whether there are disputed issues of fact as to whether appellants violated the clearly established law either by intentionally segregating Mr. Kimberlin from the general prison population or by interfering with his press contacts on account of the content of his speech. In particular, the District Court must inquire whether Mr. Kimberlin has identified affirmative evidence from which a jury could find that he has carried his burden of proving the pertinent motive.

Accordingly, the judgment of the District Court on the law-of-the-case issue is affirmed. However, the case is remanded for further proceedings to address the remaining issues on the qualified immunity claim and, if necessary, to proceed to hear the case on the merits in the event that appellants' motion is denied.

I. BACKGROUND

A. Factual Background

In 1988, Brett Kimberlin was an inmate at the Federal Correctional Institute at El Reno, Oklahoma. Nina Totenberg, a reporter with National Public Radio, contacted Mr. Kimberlin approximately one month before the November 1988 election, acting on a tip that Mr. Kimberlin claimed to have sold marijuana to then-vice-presidential candidate Dan Quayle while Mr. Quayle was in law school. The story leaked to other news organizations, and, in short time, the prison was inundated with requests to interview Mr. Kimberlin.

Mr. Kimberlin claims that on three occasions he was placed in administrative segregation because of his communication with the press and that on each occasion appellants interfered with his access to the press because of the content of his speech. The first detention occurred on November 4, 1988, after Mr. Kimberlin conducted an

interview with NBC News that NBC never aired. After the NBC interview, several news organizations contacted the prison the same day and requested interviews with Mr. Kimberlin. Prison officials arranged a group interview for that evening at 7:00 p.m. The event never occurred, because Mr. Quinlan personally canceled the interview. The District Court has previously observed that there was "some question even from the defense side as to why he did that." *Kimberlin I*, 774 F. Supp. at 7. Subsequently, around 11:00 p.m., Mr. Kimberlin was placed in administrative detention. The parties dispute the reasons both for the interviews cancellation and for Mr. Kimberlin's detention; we pass no judgment regarding whether there is sufficient evidence to establish a dispute as to the defendants' role in and motivation for the cancellation of the interview and the placement of Mr. Kimberlin in detention. Mr. Kimberlin was released from administrative detention on Saturday, November 5, and he began to organize a telephone call to a group of reporters in Washington, D.C., to take place at 10:00 a.m. on November 7, the day before the election.

Mr. Kimberlin was never permitted to make his phone call, because on Monday, November 7, he was placed in administrative segregation for a week. The parties again dispute the reason for this decision. Mr. Kimberlin was confined to administrative detention a third time on December 22, 1998. Mr. Kimberlin alleges that the defendants were responsible for both his confinement and the interference with his press contacts, all on account of the content of his speech.

B. Procedural Background

On July 2, 1990, Mr. Kimberlin filed his original complaint against Mr. Quinlan and Mr. Miller in their individual capacities, the Federal Bureau of Prisons, and the United States Government. In the instant case, all that is before the

court is Mr. Kimberlin's claim that Mr. Quinlan and Mr. Miller violated Mr. Kimberlin's First Amendment rights.

Appellants first moved to dismiss or for summary judgment on September 27, 1990, arguing, *inter alia*, that: (1) Mr. Kimberlin failed to meet the D.C. Circuit's "heightened pleading" standard which was then being applied to assess motive-based civil rights claims against government officials; (2) there was no violation of clearly established law, and, thus, appellants were entitled to qualified immunity; and (3) even if the law were clear, appellants' conduct was objectively reasonable. The District Court denied appellants' asserted qualified immunity on the First Amendment claim, finding both that Mr. Kimberlin's pleading was sufficient under the heightened pleading standard and that there was a clearly established First Amendment right for prison inmates to "be free from governmental interference with their contacts with the press if that interference is based on the content of their speech or proposed speech." *Kimberlin I*, 774 F. Supp. at 3-4.

Appellants appealed only the trial court's decision regarding the heightened pleading standard. This court reversed, *see Kimberlin*, 6 F.3d at 797-98, but the Supreme Court vacated our decision in light of *Johnson*, 515 U.S. at 304, and remanded the case for further proceedings. *See Kimberlin*, 515 U.S. at 322. This court then remanded the case to the District Court.

Discovery proceeded in the District Court, and, after completion of discovery, appellants moved to dismiss or for summary judgment on the same grounds rejected by the District Court in *Kimberlin I*. Pending the matter's disposition, however, the Supreme Court rejected this court's heightened pleading standard for civil rights suits against government officials. *See Crawford-El v. Britton*, 523 U.S. 574 (1998). Thus, appellants' only remaining arguments were that the law regarding prisoners' First Amendment rights was

not clearly established and that, even if it were, appellants' conduct was objectively reasonable.

On October 21, 1998, the District Court issued the decision that is the subject of the current appeal. The District Court denied appellants' claim of qualified immunity, holding that the "law-of-the-case," unchallenged on the first appeal, was that a prisoner's right not to have his contact with the press interfered with on the basis of the content of his communication was clearly established at the time of the alleged violations. *See Kimberlin II* at 6, *reprinted in* J.A. 29. This appeal followed.

II. ANALYSIS

A. The Law-of-the-Case Doctrine

The law-of-the-case doctrine rests on a simple premise: "the *same* issue presented a second time in the *same case* in the *same court* should lead to the *same result*." *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc). Accordingly, a "legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time." *Williamsburg Wax Museum Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987). The law-of-the-case may be revisited only if there is an intervening change in the law or if the previous decision was "clearly erroneous and would work a manifest injustice." *LaShawn A.*, 87 F.3d at 1393 (internal quotation marks omitted).

Our dissenting colleague misconstrues the posture of this appeal by suggesting that the law-of-the-case doctrine is inapplicable to the instant case. In this case, we are called upon to review the propriety of the *District Court's* application of the law-of-the-case. Thus, there is no occasion

to invoke the so-called "derivative waiver" doctrine. *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735 (D.C. Cir. 1995), suggests nothing to the contrary. The derivative waiver principle described in *Crocker* applies where a party fails to appeal an appealable issue and then raises the issue for the first time in a *subsequent appeal. See id.* at 739-40. In that circumstance, neither the District Court nor the appellate court has the opportunity to apply the law-of-the-case. Here, appellants failed to appeal an appealable issue and then raised the issue for a second time before the District Court. Therefore, we must determine whether the District Court correctly applied its established law-of-the-case. Prior opinions of this court make it clear that, in a situation such as the one raised in the case at bar, notions of derivative waiver do not come into play. *See, e.g., Palmer v. Kelly*, 17 F.3d 1490, 1494 (D.C. Cir. 1994) (reviewing the District Court's decision to apply law-of-the-case for error); *Williamsburg Wax Museum*, 810 F.2d at 250-51 (same).

We also note that, even were the dissent correct in suggesting that the "derivative waiver" doctrine applies here, "discretion to waive a waiver is normally exercised only in exceptional circumstances, where injustice might otherwise result." *Crocker*, 49 F.3d at 740 (internal quotation marks omitted). There are no "exceptional circumstances" justifying any waiver here.

Application of the law-of-the-case doctrine is a two-step process: A court must first determine whether the threshold requirements are met and then ask whether there are prudential reasons to ignore the applicable law-of-the-case. The threshold requirements for application of the law-of-the-case doctrine are plainly met in the instant case. In, *Kimberlin I*, the District Court ruled adversely to appellants on the clearly established law issue. Appellants did not challenge the clearly established law in their *Kimberlin I* appeal, although they concede that this issue was appealable. In an effort to

avoid the obvious, appellants make two arguments against application of the law-of-the-case doctrine: first, they claim that there has been an intervening change in the law that justifies prudential departure from the law-of-the-case; and, second, they contend that the doctrine should not apply to qualified immunity appeals. These arguments are meritless.

Appellants argue that intervening law has "evolved" since *Kimberlin I*. *See* Reply Br. at 9. On this point, appellants cite the Supreme Court's decision in *Sandin v. Conner*, 515 U.S. 472 (1995), which narrowed the availability to prisoners of due process challenges to disciplinary segregation. This argument does not hold water. First, without regard to *Sandin's* specific holding, the District Court in *Kimberlin I* was required to decide what law was clearly established in 1988. *Sandin*, announced in 1995, is not relevant to what law was clearly established seven years earlier.

Furthermore, *Sandin* does not mark a change in the law relevant to this case. *Sandin* only establishes that a prisoner's segregation from the rest of the prison population will trigger the procedural requirements of the Due Process Clause when the segregation falls outside the "range of confinement to be normally expected." 515 U.S. at 487. *Sandin* did not change the law regarding whether a prison official violates a prisoner's rights under the First Amendment by segregating the prisoner because of the content of a prisoner's communications with the media. Indeed, the Court in *Sandin* made it clear that:

> [p]risoners . . . *retain other protection from arbitrary state action even within the expected conditions of confinement.* They may invoke the *First* and *Eighth Amendments* and the Equal Protection Clause of the Fourteenth Amendment where appropriate, and may draw upon internal prison grievance procedures and state judicial review where available.

Id. at 487 n.11 (emphasis added). Here, then, even if Mr. Kimberlin's administrative segregation fell within the expected range of his sentence, *Sandin* recognizes that Mr. Kimberlin's administrative segregation still may allege that such segregation violated the First Amendment. Thus, there was no change in the applicable law that might have led the District Court to revisit *Kimberlin I.*

Nor is there any weight to appellants' assertion that the law-of-the-case doctrine is inapplicable to qualified immunity appeals. Appellants rely heavily on *Behrens v. Pelletier*, in which the Supreme Court acknowledged that qualified immunity issues may require more than one "judiciously timed appeal." 516 U.S. 299, 309 (1996) (internal quotation marks omitted). This is so, the Court explained, because "the legally relevant factors . . . will be different on summary judgment than on an earlier motion to dismiss. At that earlier stage, it is the defendant's conduct *as alleged in the complaint* that is scrutinized for 'objective legal reasonableness.' " *Id.* On this analysis, the defendant in *Behrens* did not waive any arguments in his first appeal, so the situation in that case did not call into play the law-of-the-case doctrine. And *Behrens* certainly does not say that the traditional law-of-the-case doctrine is inapplicable to cases involving claims of qualified immunity.

Furthermore, appellants cite nothing to indicate that the relevant facts have somehow changed so that the District Court's opinion in *Kimberlin I* regarding the clearly established law is now somehow diminished. Appellants address disputed facts only in connection with their claim that their conduct was objectively reasonable. *See* Br. for Appellants at 22-27; 28-36. However, in advancing this argument, they tellingly acknowledge that the issue of what was clearly established law at the time of the alleged violation is a legal determination that does not depend on the evidence

in dispute. In short, appellants' attempt to draw sustenance from *Behrens* is fruitless.

Finally, it is noteworthy that appellants incorrectly frame the relevant "law" for which the court must determine what was clearly established when. Appellants ask whether Mr. Kimberlin had either an "unfettered clearly established right of access to the press" or "a clearly established right not to be placed in administrative detention." Br. for Appellants at 2. These are the wrong questions. The proper question in this case, as the District Court correctly noted, is whether Mr. Kimberlin had a clearly established right "to be free from governmental interference with [his] contacts with the press if that interference is based on the content of [his] speech or proposed speech." *Kimberlin I*, 774 F. Supp. at 3-4. This right without doubt was clearly established in 1988. *See Turner v. Safley*, 482 U.S. 78, 90 (1987) ("We have found it important to inquire whether prison regulations restricting inmates' First Amendment rights operated in a neutral fashion, without regard to the content of the expression."); *Pell v. Procunier*, 417 U.S. 817, 828 (1974) (holding that so long as restriction on inmates' communication "operates in a neutral fashion, without regard to the content of the expression," it will not violate First Amendment).

B. Disputed Issues of Fact

The District Court rested the decision under review on the law-of-the-case. Finding that appellants had waived any challenge to the judgment in *Kimberlin I* on the established law, the trial court reasoned that summary judgment on grounds of qualified immunity was inappropriate. This approach fell short of what is required by *Crawford-El*, 523 U.S. at 600. In particular, the District Court failed to consider whether there are disputed issues of fact as to whether appellants violated clearly established law by intentionally

segregating Mr. Kimberlin or interfering with his press contacts on account of the content of his speech.

At oral argument, counsel for appellee urged that one line in the District Court's order suggests that the court did indeed weigh the evidence regarding the defendants' intent. *See Kimberlin II* at 4, *reprinted in* J.A. 27. We are unimpressed, for counsel's argument clearly is a stretch and it does not reach the desired mark. The reference cited by counsel is to the decision in *Kimberlin I*, in which the trial court admittedly conducted an analysis of the record then before it. *See* 774 F. Supp. at 6-8. However, discovery has continued since *Kimberlin I*, and there is nothing in *Kimberlin II* that addresses the current record.

We therefore remand this matter to the District Court for consideration of whether there are disputed issues of material fact regarding the defendants' motivation. In so doing, the District Court must ask whether Mr. Kimberlin has identified "affirmative evidence from which a jury could find that the plaintiff has carried his or her burden of proving the pertinent motive." *Crawford-El*, 523 U.S. at 600.

The District Court will have two principal considerations at the forefront upon remand. First, the District Court is not foreclosed from issuing a summary judgment for appellants merely because Mr. Kimberlin's claim rests on appellants' motive. It. is true that "objective" issues such as whether the plaintiff suffered an injury or engaged in protected conduct are "more amenable to summary disposition than disputes about the official's intent." *Id.* at 599. Nonetheless, the Supreme Court has expressed faith in the experience of District Court judges to manage cases involving allegations of improper intent in a way that will allow for summary judgment in appropriate cases. Indeed, this expressed faith laid the foundation for the Court's rejection of the so-called "heightened pleading" standard in civil rights actions against government officials. *See id.* at 600-01.

Second, even if appellants provide an objectively valid reason for their actions in this case, the District Court must still inquire into whether there is a disputed issue of fact as to whether appellants were actually motivated by an illegitimate purpose. The opinion for the Court in *Crawford-El* specifically rejected the dissent's proposal to "immunize all officials whose conduct is 'objectively valid,' regardless of improper intent." *Id.* at 593-94. Moreover, in considering any objectively valid reasons offered by appellants, the District Court should be mindful of the Supreme Court's recent decision in *Wilson v. Layne*, 119 S. Ct. 1692 (1999). In *Wilson*, the Court described the "objectively reasonable" aspect of the qualified immunity defense as "whether a reasonable officer could have believed that bringing members of the media into a home during the execution of an arrest warrant was lawful, in light of clearly established law and the information the officers possessed." *Id.* at 1700. The analogous question in this case has already been answered: the District Court has found that no reasonable prison official could believe that interfering with an inmate's access to the press because of the content of the inmate's speech could be lawful. The District Court must now weigh the evidence to determine if there are disputed issues of fact as to whether appellants were motivated by improper intent.

Upon resolving these questions, the District Court will either issue a summary judgment for appellants or proceed to hear the case on the merits. The second possibility will result in an interlocutory order which will not be subject to immediate review. *See Johnson*, 515 U.S. at 313-18. Nonfinal qualified immunity determinations are appealable "when they resolve a dispute concerning an abstract issue of law relating to qualified immunity—typically, the issue whether the federal right allegedly infringed was clearly established." *Behrens*, 516 U.S. at 313 (internal quotation marks omitted) (citing *Johnson*, 515 U.S. at 317). When the law and fact

issues are not separable, however, a very different situation arises:

> Many constitutional tort cases, unlike the simple "we didn't do it" case before us, involve factual controversies about, for example, intent—controversies that, before trial, may seem nebulous. To resolve those controversies—to determine whether there is or is not a triable issue of fact about such a matter—may require reading a vast pretrial record, with numerous conflicting affidavits, depositions, and other discovery materials.

Johnson, 515 U.S. at 316. The "upshot," according to the Court, "is that . . . considerations of delay, comparative expertise of trial and appellate courts, and wise use of appellate resources argue in favor of limiting interlocutory appeals of 'qualified immunity' matters to cases presenting more abstract issues of law." *Id.* at 317. The District Court's original decision that Mr. Kimberlin's First Amendment rights were clearly established at the time of the alleged violation was immediately appealable, because the disputed issue involved an "abstract" issue of law. Whether there is a disputed issue of material fact regarding appellants' intent, however, is not "separable" from Mr. Kimberlin's underlying cause of action; in fact, it is part and parcel of his claim.

Moreover, this court has interpreted *Behrens* and *Johnson* to draw a clear distinction between the availability of appellate review in qualified immunity cases involving pure legal issues and those involving disputed issues of fact:

> In the qualified immunity arena, the Supreme Court has drawn a distinction between two categories of cases, only one of which merits immediate appellate review: an interlocutory decision that rests upon the purely legal question of whether or not an official's actions violate clearly established law does satisfy the *Cohen* criteria, while an interlocutory decision that denies summary

judgment because of the presence of triable issues of fact does not.

Meredith v. Federal Mine Safety & Health Review Comm'n, 177 F.3d 1042, 1048-49 (D.C. Cir. 1999) (citations omitted); *see also Farmer v. Moritsugu*, 163 F.3d 610, 613-14 (D.C. Cir. 1998) (distinguishing interlocutory appeals of qualified immunity raising abstract legal issues from appeals challenging the sufficiency of the evidence).

Thus, if the District Court, on remand, denies summary judgment on the issue of appellants' intent, the matter will not be subject to immediate appeal.

III. CONCLUSION

For the reasons articulated herein, the case is remanded to the District Court for further proceedings consistent with this opinion.

KAREN LECRAFT HENDERSON, *Circuit Judge*, dissenting in part:

I dissent from the majority's holdings that (1) the law of the case doctrine bars review of the district court's determination that the applicable law was clearly established at the time of the alleged constitutional deprivation and (2) that the case must be remanded to determine whether the appellants' conduct violated clearly established law. In my view, law of the case does not apply, the applicable law was clearly established and the appellants' conduct, as revealed in the record, did not violate the clearly established law. Accordingly, I would hold that the appellants are entitled to qualified immunity and remand for entry of judgment in their favor.

First, I disagree with the majority's contention that the appellants' failure in their first appeal to challenge the district court's ruling that the relevant law was clearly established made that ruling the "law of the case" precluding the appellants from arguing otherwise now. As this court explained in *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735 (D.C. Cir. 1995), "law-of-the-case doctrine holds that decisions rendered on the first appeal should not be revisited on later trips to the appellate court." 49 F.3d at 739. In other words, law of the case applies where "the first appeals court has affirmatively decided the issue, be it explicitly or by necessary implication." *Id.* Because this court did not decide the clearly established law issue in the 1992 appeal, we here confront not law of the case but an "analytically distinct principle . . .—best understood as a species of waiver doctrine" which "does not involve any previous appellate court decision on the barred issue" but imposes a "bar on raising issues omitted from prior appeals." *Id.* Under this waiver principle, " 'a legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, [governs] future stages of the

same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time.' " *Id.* (quoting *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987); citing *Palmer v. Kelly*, 17 F.3d 1490, 1495-96 (D.C. Cir. 1994); *Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071, 1089-90 (D.C. Cir. 1984)).[1] I do not believe, however, that waiver bars appeal of the clearly established law determination here.

As the court in *Crocker* noted, "neither law-of-the-case doctrine proper nor th[e] subsidiary waiver principle is an absolute preclusion to appellate review." *Id.* Each of these principles' is "prudential" and admits of exceptions "broader than for conventional issue or claim preclusion" but the preclusive effect of waiver is "one notch weaker" than that of law of the case. *Id.* In the case of waiver, "the appellate court, for example, always possesses discretion to reach an otherwise waived issue logically 'antecedent to and ultimately dispositive of the dispute before it.' " *Id.* at 740 (quoting *United States Nat'l Bank of Oregon v. Independent Ins. Agents of Am.*, 508 U.S. 439, 447 (1993)).

In *Insurance Agents*, the United States Supreme Court held this court had not abused its discretion in deciding an issue first raised in supplemental post-argument briefing although the appellants had failed to raise it in either their opening or reply brief before argument. The Court so held because the neglected issue—whether a statute had been repealed—was "antecedent to" and "dispositive of" the question addressed in the opening brief—how the provision should be construed. While the circumstances here (two separate appeals) are

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[1] In *Palmer*, this court applied the waiver theory (albeit under the "law of the case" rubric) in the same circumstances we have here—where the district court concluded its earlier unappealed decision was law of the case. *See* 17 F.3d at 1495-96 (defendant "waived" claim through "failure to appeal on alternative grounds" in earlier appeal).

somewhat different from those in *Insurance Agents* (a single appeal with post-argument supplemental briefing), the same reasoning applies. Whether the law was clearly established is "antecedent to" and, if decided in the appellants' favor, "dispositive of" the issue argued in the 1992 appeal: whether the appellants in fact violated the law. If the law was not clearly established then it is irrelevant whether or not the appellants violated the law because they were shielded by qualified immunity and therefore entitled to judgment as a matter of law. *See Behrens v. Pelletier*, 516 U.S. 299, 306 (1996) ("Unless the plaintiffs allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery.") (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). Given the strong policy favoring an official's "entitlement not to stand trial or face the other burdens of litigation," *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), we should exercise our discretion here and decide whether the law was clearly established at the time of the alleged violation. I conclude that it was.

Case law from the Supreme Court, as well as from circuit courts including this one, make it clear that the right identified by the district court—federal inmates' "First Amendment right to be free from governmental interference with their contacts with the press if that interference is based on the content of their speech or proposed speech right of federal prisoners," 774 F. Supp. at 3-4—was well established at the time of the alleged violation in November 1988. *See Crawford-El v. Britton*, 93 F.3d 813, 826 (D.C. Cir. 1996) (*en banc*) ("[I]n light of *Turner* [*v. Safley*, 482 U.S. 78 (1987)] and related cases, retaliation against Crawford-El for criticism of the prison administration that was truthful, and not otherwise offensive to some penological interest (so far as appears), would have violated a clearly established right of which a reasonable prison official would have known.")

(citing *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 571-72 (1968)), vacated on other ground, 523 U.S. 574 (1998); *Murphy v. Missouri Dept of Correction*, 769 F.2d 502, 503 (8th Cir. 1985) ("While a prisoner enjoys no constitutional right to remain in a particular institution and generally is not entitled to due process protections prior to such a transfer, prison officials do not have the discretion to punish an inmate for exercising his first amendment rights by transferring him to a different institution.") (citing *Garland v. Polley*, 594 F.2d 1220, 1222-23 (8th Cir. 1979)) (internal citations omitted); *Main Rd. v. Aytch*, 522 F.2d 1080, 1086-87 (3d Cir. 1975) ("Even if the prisoners held pending trial have no constitutional right to meet with reporters, the First Amendment precludes Aytch from regulating, through the grant or denial of permission for prisoners to talk with reporters, the content of speech which reaches the news media, unless the restriction bears a substantial relationship to a significant governmental interest."). I therefore concur—albeit on a different ground—in the majority's affirmance of the district court's holding that the law was clearly established. I disagree, however, with the majority's decision to remand in order to determine whether the appellant's conduct violated the clearly established law.

Although the district court's order does not expressly address whether the evidence, viewed most favorably to Kimberlin, makes out a constitutional deprivation, the issue is nevertheless properly before this court. The appellants' summary judgment motion below expressly argued the issue, *see Kimberlin v. Quinlan*, No. 90-1549, Memorandum in Support of Summary Judgment Motion at 16-29 (filed Feb. 3, 1997), and the district court, in denying the summary judgment motion, at least implicitly resolved it in Kimberlin's favor. Thus, "there is no apparent impediment to [the argument] being raised on appeal." *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996) (authorizing appeal where argument

"was presented by the petitioner in the trial court" and "the District Court's denial of petitioner's summary judgment motion necessarily determined that certain conduct attributed to petitioner . . . constituted a violation of clearly established law," notwithstanding that "the District Court, in denying petitioner's summary judgment motion, did not identify the particular charged conduct that it deemed adequately supported"). We should therefore address the question now,[2] without remand, and we should resolve it in the appellants' favor.

As the district court did not identify what the evidence reveals the appellants did, it is this court's "task" to undertake a " 'review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed' " *Behrens*, 516 U.S. at 313 (quoting *Johnson*, 515 U.S. at 319). The uncontroverted facts establish that appellant Quinlan canceled the press conference because it was not authorized under Bureau of Prisons policy and ordered Kimberlin's first administrative segregation for the purpose of ensuring Kimberlin's safety. No evidence suggests that Quinlan undertook these acts with intent to prevent Kimberlin from reporting his story to the press, which Kimberlin had in fact already done in an interview with NBC

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[2] Appeal of this issue is not barred under *Johnson v. Jones*, 515 U.S. 304, 319 (1995), which held that no appeal lies "if what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred." *Behrens*, 516 U.S. at 313. Here, the issue is, as in *Behrens*, whether "the conduct which the District Court deemed sufficiently supported for purposes of summary judgment met the *Harlow* standard of 'objective legal reasonableness.' " *Id.; see also Farmer v. Moritsugu*, 163 F.3d 610, 614 (D.C. Cir. 1998) (permitting immediate appeal where case " 'concern[s], not which facts the parties might be able to prove, but, rather, whether or not certain given facts show[ ] a violation of "clearly established" law' ") (quoting *Johnson*, 515 U.S. at 311) (alterations original).

News which Quinlan had himself facilitated. Nor is there evidence that Quinlan was at all involved in the two subsequent segregations on November 7 and December 22, 1988. As for appellant Miller, the record does not indicate that he made any effort in his telephone conversations with the Bureau of Prisons either to get the press conference canceled or to secure Kimberlin's confinement. Because the appellants' conduct as revealed by the record, viewed in the light most favorable to the plaintiff, did not violate Kimberlin's First Amendment rights (clearly established or otherwise), both are entitled to qualified immunity. *See Siegert v. Gilley*, 500 U.S. 226 (1991) (defendant entitled to qualified immunity where plaintiff "not only failed to allege the violation of a constitutional right that was clearly established at the time of the [defendant's] action, but . . . failed to establish the violation of any constitutional right at all.").

For the foregoing reasons, I would remand with direction to enter summary judgment for the appellants.

APPENDIX B

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed Apr. 4, 2000]

No. 98-5530

BRETT C. KIMBERLIN,

Appellee

v.

MICHAEL J. QUINLAN, individually and as Director of the Bureau of Prisons, U.S. BUREAU OF PRISONS AND LOYE W. MILLER, JR., individually,

Appellants

BEFORE: EDWARDS, *Chief Judge*, SILBERMAN and HENDERSON, *Circuit Judges*

ORDER

Upon consideration of appellants' petition for rehearing filed February 11, 2000, and of the response thereto, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
MARK J. LANGER, Clerk

BY: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judge Henderson would grant the petition for rehearing.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed Apr. 4, 2000]

No. 98-5530

BRETT C. KIMBERLIN,

Appellee

v.

MICHAEL J. QUINLAN, individually and as Director of the Bureau of Prisons, U.S. BUREAU OF PRISONS AND LOYE W. MILLER, JR., individually,

Appellants

BEFORE: EDWARDS, *Chief Judge*; SILBERMAN, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL and GARLAND, *Circuit Judges*

ORDER

Appellants' petition for rehearing en banc and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular, active service did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
MARK J. LANGER, Clerk

BY: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judges Sentelle and Garland did not participate in this matter.

A statement of Circuit Judge Henderson dissenting from the denial of rehearing *en banc* is attached.

HENDERSON, *Circuit Judge,* dissenting:

I dissent from the denial of the appellants' petition for rehearing *en banc* for the reasons set forth in my panel dissent. *See Kimberlin v. Quinlan,* 199 F.3d 496, 504-06 (D.C. Cir. 1999). Because the record, viewed in the light most favorable to the appellee, does not establish a constitutional violation, the appellants are entitled to qualified immunity and we should therefore reverse the district court flat out. *See Siegert v. Gilley,* 500 U.S. 226 (1991). Instead we remand for the appellee to resume his quest for evidence of an imagined wrong. So doing, we waste the time and resources of all involved.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed Oct 21, 1998]

Civil Action No. 90-1549
(HHG)

BRETT C. KIMBERLIN,

Plaintiff,

v.

J. MICHAEL QUINLAN, *et al.*,

Defendants.

OPINION

This case arises out of events that took place in the fall of 1988, just prior to the presidential election, at the El Reno Federal Correctional Institution in Oklahoma. The plaintiff, Brett C. Kimberlin, alleges that he was prevented from speaking to journalists about his claim that he sold marijuana to then vice-presidential candidate Dan Quayle in 1971, and that he was retaliated against when he persisted in his attempts to speak to the press.

Some of Kimberlin's claims were dismissed in an August 1991 Opinion. *See Kimberlin v. Quinlan*, 774 F. Supp. 1 (D.D.C. 1991) ("*Kimberlin I*") rev'd, 6 F.3d 789 (D.C. Cir. 1993), reh'g *en banc denied*, 17 F.3d 1525 (D.C. Cir. 1994), *vacated*, 515 U.S. 321 (1995), *appeal dismissed for lack of jurisdiction*, 1995 WL 759464 (D.C. Cir. 1995).[1] Still remaining of his original claims are the First Amendment

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[1] For a summary of the facts of this case, see *Kimberlin I*, 774 F. Supp. at 1.

Bivens[2] claim against Quinlan and Miller, a false imprisonment claim against the United States under the Federal Tort Claims Act ("FTCA") and a claim against the Bureau of Prisons and its former Director, J. Michael Quinlan, in his official capacity, under Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

After having been stayed in part pending the Supreme Court's decision. in *Crawford-El v. Britton* 118 S. Ct. 1584 (1998), the case is presently again before the Court on the defendants' motions for summary judgment on all counts, plaintiff's oppositions, and the replies thereto.

I. Summary Judgment

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (c) For purposes of summary judgment, "the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (emphasis in original). In determining this, a court must draw all justifiable inferences in favor of the non-moving party. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 520 (1991). However, a court may draw "only those inferences that are legitimate and reasonable . . . A scintilla of evidence is not enough." *Harbor Ins. Co. v. Schnabel Found. Co., Inc.*, 946 F.2d 930, 935 (D.C. Cir. 1991).

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[2] *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388* (1971).

A. *Bivens* Defendants Quinlan and Miller—Qualified Immunity

In Count I of his Complaint Kimberlin contends that Quinlan and Miller violated his First Amendment rights by restricting his access to the press based on the content of his speech and by retaliating against him for that speech by placing him in administrative detention. Quinlan and Miller moved for summary judgment on the ground that they are entitled to qualified immunity and may not be sued for their actions.

Government officials "performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982). The qualified immunity doctrine "permit[s] the resolution of . . . insubstantial claims on summary judgment" and allows government officials to avoid the costs of trial in "cases where the legal norms the officials are alleged to have violated were not clearly established at the time." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

In *Kimberlin I*, this Court concluded that as of November 1988, it was clearly established that, "absent special circumstances, federal prison inmates have a First Amendment right to be free from governmental interference with their contacts with the press if that interference is based on the content of the speech or proposed speech." *Kimberlin I*, 774 F. Supp. at 3-4 (citing and explaining cases). Next, the Court analyzed in detail this Circuit's then-existing "heightened pleading standard" to determine the type and quality of evidence plaintiff had to produce in order to survive a motion to dismiss. When faced with a claim of qualified immunity, the "heightened pleading standard" required "inquiry into subjective intent unrelated to knowledge of the law . . . where the constitutional violation turns on

an unconstitutional motive." *Siegert*, 895 F.2d 797, 802 (D.C. Cir. 1990), *aff'd on other grounds*, 500 U.S. 226 (1991).

After examining *Siegert*, this Court concluded that a plaintiff would meet the heightened standard "as long as the complaint, together with the supporting exhibits before the Court, present allegations [of unconstitutional motive] that are tangible and nonconclusory, even if these allegations would properly be regarded as circumstantial (as distinguished from direct or testimonial)." *Kimberlin I*, 774 F. Supp. at 6. After examining plaintiff's evidence under the heightened standard, this Court denied the defendants' motion to dismiss because plaintiff had put forth evidence adequate to comply with the heightened pleading requirement. *See Kimberlin I*, 774 F. Supp. at 8.

On appeal, the Court of Appeals stated that to meet the heightened standard, plaintiffs were required to proffer direct evidence of unconstitutional motive and were precluded from relying on "mere circumstantial evidence." *Kimberlin v. Quinlan*, 6 F.3d 789, 795 (D.C. Cir. 1993) ("*Kimberlin II*"). Applying that requirement, the Court of Appeals concluded that plaintiff had not met his burden, reversed this Court's decision, and remanded the case for consideration of plaintiff's other claims.

The Court of Appeals, decision in *Kimberlin II* was vacated by the Supreme Court. *See Kimberlin v. Quinlan*, 515 U.S. 321 (1995). On remand from the Supreme Court, the Court of Appeals dismissed the appeal for lack of jurisdiction and remanded the case to this Court.

Recently, the Supreme Court invalidated this Circuit's "heightened pleading standard." *See Crawford-El v. Britton*, 118 S. Ct. at 1584. In *Crawford-El*, the Supreme Court held that there is no "heightened pleading standard" for constitutional damage actions against government officials where improper motivation is an essential element of the charge.

The Court made clear that the issues of qualified immunity and the plaintiff's showing of improper motivation are separate questions that do not overlap and are to be analyzed separately. *See Crawford-El*, 118 S. Ct. at 1592-1596.

Now, after a journey through the Court of Appeals and the Supreme Court, and with the benefit of discovery, the defendants again raise the issue of qualified immunity. Quinlan and Miller contend that, contrary to this Court's conclusion, there was, and is, no clearly established right of prisoner access to the media. *See* Defs.' Mot. at 16. The defendants also contend that Kimberlin had no right to be free from administrative detention. *See id.* at 20. The defendants conclude that, because the plaintiff had no clearly established rights to press access and freedom from detention, they acted reasonably and in conformity with applicable law and are thus entitled to qualified immunity.

As the Supreme Court made clear in *Forsyth*, qualified immunity is an "essentially legal question" that turns on a determination of whether the defendants, actions "violated clearly established law" at the time they were undertaken. *Forsyth*, 472 U.S. at 526-528. This Court's ruling in *Kimberlin I* as to whether the rights claimed to have been violated were clearly established at the time of the injury, a ruling that went unchallenged on appeal, established the "law of the case." *See Williamsburg Wax Museum v. Historic Figures, Inc.*, 801 F.2d 243, 250 (D.C. Cir. 1987). Thus, the Court's previous answer to this "legal question" remains the same: at the time of the events that form the basis of this case, a prisoner's right to be free from content-based interference with his contact with the media was clearly established. Accordingly, the defendants are not entitled to qualified immunity. The defendants' motion to dismiss or for summary judgment is denied.

B. Federal Tort Claims Act—False Imprisonment Claim

In Count Three of his Complaint, the plaintiff alleges that prison officials falsely imprisoned him, and thus violated the Federal Tort Claims Act, by placing him in administrative, detention. The United States, the defendant for this claim, contends that this claim must fail because the actions taken by prison officials are discretionary functions that are exempted from the provisions of the FTCA.

1. Venue

As a preliminary matter, the parties dispute whether venue for the false imprisonment claim lies in the District of Columbia, Oklahoma or Illinois. The defendant essentially argues that venue is proper anywhere but the District of Columbia, asserting on one hand that the "act or omission" giving rise to, the claim occurred in Illinois because that is where Quinlan made the phone call allegedly ordering that Kimberlin be placed in administrative detention, and on the other that venue is proper in Oklahoma because that is where Kimberlin was actually placed in detention.

The defendant has failed to convince the Court that it should revisit its earlier decision that venue is proper in the District of Columbia. *See Kimberlin I*, 774 F. Supp. at 9-10. The Court is satisfied that there is a sufficient nexus between the District of Columbia and the alleged acts or omissions that led to the plaintiff being placed in administrative detention such that venue is proper in this jurisdiction.

2. Discretionary Function Exception

The provisions of the FTCA do not apply to

> any claim based upon an act . . . of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance . . . of a discretionary function or duty on

> the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a) (1994). The Supreme Court has made clear that the exception covers "only acts that are discretionary in nature, acts that involve an element of judgment or choice." *United States v. Gaubert*, 499 U.S. 315, 322 (1991) (internal quotations and citations omitted). It is the "nature of the conduct, rather than the status of the actor that governs whether the exception applies." *Id.* (citing *United States v. Varig Airlines*, 467 U.S. 797 (1984)).

When analyzing whether the challenged actions are covered by the discretionary function exception, the Court first inquires whether the acts taken by the prison officials were discretionary, or whether they were instead controlled by a mandatory statute or regulation. *See Berkovitz v. United States*, 486 U.S. 531, 536 (1988).[3] If the Court determines that the challenged conduct involved the requisite "element of judgment," it must then determine "whether that judgment is of the kind that the discretionary function exception was designed to shield." *Id.*

When performing this inquiry, the Court is to be mindful the purpose of the exception is to "prevent judicial second guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Varig*, 467 U.S. at 814. Thus, the exception "protects only governmental actions and decisions

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[3] An act is not discretionary if a "federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow," because "the employee has no rightful option but to adhere to the directive." *Berkovitz*, 486 U.S. at 536.

based on considerations of public policy." *Berkovitz*, 486 U.S. at 537.

The plaintiff contends that the discretionary function exception does not apply, asserting that the applicable administrative detention regulations are mandatory and that there is no room for discretion by prison officials when making a decision to place an inmate in administrative detention. The regulation governing the placement of prisoners in administrative detention provides in part that

> The Warden [or his Lieutenants] may . . . place an inmate in administrative detention when the inmate's continued presence in the general population poses a serious threat to life, property, self, staff, other inmates or to the security or orderly running of the institution and when the inmate: (1) [i]s pending a hearing for a violation of Bureau regulations; (2) [i]s pending an inivestigation of a violation of Bureau regulations . . .; (5) [r]equests admission to administrative detention for the inmate's own protection, or staff determines that admission to or continuation in administrative detention is necessary for the inmate's own protection . . . .

28 C.F.R. § 541.22(a) (1997). After careful consideration, the Court concludes, as explained below, that the discretionary function exception applies in this case and that the plaintiff's false imprisonment claim must be dismissed.

a. Whether placing an inmate in administrative detention is a discretionary function

First, plaintiff contends that this Court's statement in *Kimberlin I* that the "mandatory language in the Federal Bureau of Prisons regulations on administrative detention . . . grant Kimberlin a liberty interest in remaining free from an administrative detention that is effected without compliance with these regulations" puts to rest any doubt about whether

the regulation is mandatory or discretionary. *See Kimberlin I*, 774 F. Supp. at 8 (citing *Hewitt v. Helms*, 459 U.S. 460 (1983)). Contrary to plaintiff's gloss, however, this Court's statement in *Kimberlin I* goes to the mandatory nature of the process that Kimberlin was due under the regulations and did not address the nature of the regulations governing a decision to place Kimberlin in administrative detention. Thus, it has no bearing on the Court's inquiry here.

Next, plaintiff asserts that the enumeration of reasons for which an inmate may be segregated from the general population obviates the discretion of the warden and makes the regulation mandatory. This argument also fails. The plain language of the regulation vests placement of an inmate in administrative detention in the discretion of the warden. It sets forth circumstances under which an inmate may be placed in detention but places discretion in the warden as to whether to place the inmate in detention. *Cf. Gaubert*, 499 U.S. at 329 (noting that even though a statute enumerated specific grounds that would warrant the appointment of a conservator by the FHLBB, the determination of whether any of the grounds existed depended on the "opinion of the Board."). The regulations in this case do not require a prison official to "act in a particular way; the exercise of . . . authority involved a[n] . . . 'element of judgment or choice.' " (citing *Berkovitz*, at 536); *see also Calderon v. United States*, 923 F. Supp. 127, 130 (N.D. Ill. 1996) (concluding that the administrative detention regulations are discretionary because they "do not mandate a particular result but, rather, provide criteria for BOP officials to consider in determining whether to segregate a given inmate"), *aff'd*, 123 F.3d 947 (7th Cir. 1997). Accordingly, the Court concludes that the placement of an inmate in detention is a discretionary act.

b. Whether the exception shields a decision to place an inmate in administrative detention

Next, the Court must determine whether the discretion exercised is of the kind that the discretionary function exception was designed to shield. *See Gaubert*, 499 U.S. at 322-23. The exception protects "only governmental actions and decisions based on considerations of public policy." *Id.* at 323. The focus of the inquiry is on the nature of the actions taken and on whether they are susceptible to policy analysis. *See United States v. Gaubert*, 499 U.S. 315, 325 (1991).

The stated purpose of the administrative detention regulation is to ensure that "inmates may live in a safe and orderly environment." 28 C.F.R. § 541.10. It is clear to the Court that the act of placing an inmate in administrative detention for his safety or while pending an investigation or hearing for a violation of Bureau regulations is the type of discretion the exception was designed to protect. Prison officials must have the ability to place inmates in detention for their safety or to further the orderly operation of the institution without being challenged every time that decision is made. *See Varig*, 467 U.S. at 814. Further, it is clearly necessary for prison officials to be able to exercise this discretion prior to substantiating claims about safety or a violation of regulations. *Cf. Calderon*, 923 F. Supp. at 132 ("It must be within the sound discretion of prison officials to determine whether an inmate's complaints about another inmate's behavior establish a reasonable belief that a violation of Bureau regulations has been committed by an inmate warranting administrative segregation or other disciplinary action.") Accordingly, the United States' motion for summary judgment on the false imprisonment claim is granted.

C. Title III of the Omnibus Crime Control Act and Safe Streets Act of 1968

Count IV of the plaintiff's Complaint alleges that the Bureau of Prisons and Quinlan, in his official capacity, violated Title III of the Crime Control Act ("Title III" or "Act") by listening to, recording, and distributing tapes of the plaintiff's conversations that were conducted over prison telephones. Quinlan and the BOP have moved for summary judgment on this claim on the grounds of (1) sovereign immunity; (2) consent; and (3) that the plaintiff's communications were intercepted in the "ordinary course" of law enforcement duties. The plaintiff replies that summary judgment is inappropriate because the parties have had only limited discovery on this issue. Alternatively, he asserts that summary judgment is precluded because there are genuine issues of fact as to whether he consented to his phone conversations being monitored and whether the interceptions at issue were done in the "ordinary course" of law enforcement duties. He also contends that Title III waives the sovereign immunity of the United States vis-a-vis the BOP.

1. The Statute

Title III provides that "except as otherwise specifically provided in this chapter any person (a) who intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication" shall be found in violation of the statute. 18 U.S.C. § 2511(l) (1970 & 1998 Supp.). "Intercept" is defined as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." 18 U.S.C. 2511(4).

It is established that Title III applies to prisons and prison inmates. *See Kimberlin I*, 774 F. Supp. at 10 (citing cases). Two exceptions to liability under Title III are consent by one

of the parties to the communication, *see* 18 U.S.C. § 2511(2)(c), and interception by an investigative or law enforcement officer in the ordinary course of his duties. *See* 18 U.S.C. § 2510(5)(a.)(ii).

2. Sovereign Immunity

Quinlan and the BOP assert that they may not be sued under Title III because the Act does not waive the sovereign immunity of the United States. The Court agrees as to the BOP and dismisses the plaintiff's Title III claim as it applies to the agency.

The United States, as sovereign, may not be sued without its consent. *See United States v. Testan*, 424 U.S. 392, 399 (1976). Accordingly, a suit may not be brought against the United States unless brought pursuant to a specific statute under which the United States has consented to suit. *See id.* Further, federal agencies are not subject to suit *eo nomine* unless authorized explicitly by Congress, *see Blackmar v. Guerre*, 342 U.S. 512, 515 (1952), and it is well-settled that waivers of sovereign immunity must be explicit and cannot be implied. *See e.g. United States v. Sherwood*, 312 U.S. 584, 586 (1941).

Title III provides that

> except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.

18 U.S.C. § 2520(a)(1970 & 1998 Supp.) (emphasis added).

"Person" is defined in part as "any employee, or agent of the United States." 18 U.S.C. § 2510(6). The term "entity" is not defined. Plaintiff contends that the inclusion of the term

waives the sovereign immunity of the BOP. Alternatively, he claims the United States must have waived immunity because other Wiretapping Act suits have gone forward. Neither argument is persuasive.

As noted above, waivers of sovereign immunity must be explicit. The language of the statute provides no explicit waiver of sovereign immunity. Accordingly, the motion for summary judgment as it relates to the BOP is granted and the plaintiff's Title III claim against it is dismissed for lack of jurisdiction.

Quinlan, however, may be sued pursuant to Title III. Section 2520 provides that an aggrieved party may proceed civilly against a "person" who violated the Act Although Quinlan asserts that he is also immune from suit, the plain language of the statute and the legislative history of the Act counsel otherwise. The Senate Report accompanying the bill provides that "the definition [of "person"] explicitly includes any officer or employee of the United States." S. Rep. No. 1097, 90th Cong., 2d Sess. (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2179. Accordingly, the motion for summary judgment on the ground of sovereign immunity is denied as to defendant Quinlan.

2. Consent Exception

Title III provides an exception to liability where "one of the parties to the communication has given prior consent to such interception." 18 U.S.C. § 2511(2)(c). The defendant[4] asserts that Kimberlin expressly and implicitly consented to the monitoring of his phone calls because he was notified that his phone conversations could be monitored, signed a form

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[4] Because the Court has determined that it does not have jurisdiction over the BOP, the remainder of this opinion will treat Quinlan as the only defendant to the Title III claim.

acknowledging that notification, and then used the telephone after receiving that notice.

In support of his claim that Kimberlin consented to monitoring of his calls the defendant offers the following:

(1) Kimberlin was notified at an inmate orientation that his calls might be monitored. *See* Def.'s Ex. 3 (Dep. of Tommy C. Martin).

(2) After this notification, Kimberlin signed a form that recited that phone calls may be monitored. By a mark on the form, Kimberlin indicated that he had read the foregoing and signed directly below that mark. *See* Def.'s Ex. 2.[5]

(3) Prison phones are labeled with a warning that phone calls may be monitored. *See* Def.'s Ex. 3.

(4) The call monitoring policy is available in the prison library and that Kimberlin has visited that library. Def.'s Ex. 3 and Reply Ex. 1, 2.

(5) A copy of Kimberlin's administrative complaint challenging being placed in administrative detention for allegedly placing a "third-party" telephone call. Kimberlin references the prison phone call monitoring

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[5] The text of the form signed by Kimberlin reads "The Bureau of Prisons reserves the authority to monitor (this includes recording) conversations on any telephone located within its institutions, said monitoring to be done to preserve the security and orderly management of the institution and to protect the public. An inmates' use of institutional telephones constitutes consent to this monitoring. A properly placed phone call to an attorney is not monitored."

"I have read or had read to me (cross out one) the above notification on the monitoring of inmate telephone calls, I understand that telephone calls I make from institution telephones may be monitored and recorded." Def.'s Ex. 2.

regulation, #5264.9, in that complaint., *See* Def.'s Reply Ex. 3 at 2.

Implicit consent satisfies the Title III consent exception. *See Berry v. Funk*, 97-5257, slip. op., D.C. Cir. July 14, 1998 at 14. Implied consent "is inferred from surrounding circumstances indicating, that the [party] knowingly agreed to the surveillance." *Id.* (citing *Griggs-Ryan v. Smith*, 904 F.2d 112, 117 (1st Cir. 1990); *see United States v. Amen*, 831 F.2d 373, 378 (2d Cir. 1987). In evaluating whether a party implicitly consented to monitoring the "key question . . . [is] whether parties were given sufficient notice." *Berry*, slip. op. at 14. Absent actual notice, consent may be implied only when "the surrounding circumstances[] convincingly show that the party knew about and consented to the interception." *Id.* (citing *United States v. Lanoue*, 71 F.3d 966, 981 (1st Cir. 1995)). The question for this Court, then, is whether the plaintiff received adequate notice that his calls might be monitored such that he may be deemed to have consented to such monitoring.

In *Amen*, the leading case addressing prison inmate consent to monitoring, the court implied consent based on the facts that (1) the Code of Federal Regulations provides public notice of the possibility of monitoring; (2) upon arriving at the prison, the inmates must attend an admission and orientation lecture in which monitoring of calls is discussed; (3) the inmates receive a copy of a handbook that contains a notice about the monitoring and taping system; and (4) each prison phone was labeled with a notice stating that conversations might be monitored. *See* 831 F.2d at 379.

In this case, the plaintiff presented little to rebut the defendant's evidence that the plaintiff consented to the monitoring of his phone calls. He does not contradict defendant's evidence that he signed a form acknowledging that his calls might be monitored, that the phones were marked with notices that calls might be monitored, and that

he was familiar with the specific prison regulation governing monitoring of inmate calls. He merely asserts that he was never told how to make an unmonitored call to his attorney. *See* Pl.'s Ex. 13. That fact is relevant, if at all, to whether prison officials exceeded the scope of Kimberlin's consent when monitoring his calls, not to whether he consented at all. Thus, based on the uncontroverted facts and circumstances presented by the defendant, the Court concludes that Kimberlin consented to the monitoring of his phone calls.

a. Scope of Consent

Consent within the meaning of section 2511(2)(c) is not an "all or nothing proposition." *Watkins*, 704 F.2d at 582; *Griggs-Ryan*, 904 F.2d at 119. The "parameters of consent may be circumscribed depending on the subtleties and permutations inherent in a particular set of facts." *Griggs-Ryan*, 904 F.2d at 119. In this case, the Court is to examine the parameters of the consent and determine whether the interception and monitoring exceeded those boundaries. Kimberlin contends that prison officials exceeded the scope of his consent by monitoring his calls for purposes other than prison security and by monitoring and recording phone calls with his attorney.

First, based on the wording of the consent form signed by Kimberlin, it is clear to the Court that Kimberlin consented to the monitoring of all phone calls made from monitored phones within the El Reno facility. *See e.g.* Def.'s Ex. 2. In light of this conclusion, the fact that prison officials may have monitored plaintiff's calls to his attorney from a monitored phone does not preclude summary judgment. Kimberlin put forth no evidence that prison officials monitored a "properly placed phone call to an attorney." He avers only that he was never instructed how to place such a call. Drawing all inference in favor of the plaintiff, that fact, even if true, does not create a genuine issue of material fact.

Based on the foregoing, the Court concludes that Kimberlin consented to the monitoring and/or recording of all calls made by Kimberlin on a monitored phone.[6]

2. "Use and Disclosure" of the Content of the Calls

Next, Kimberlin contends that even if he consented to the monitoring of his calls, the defendant violated Title III by placing the calls on tape and using them for political purposes.

Title III is violated when any person intentionally discloses [or uses] or endeavors to disclose or use "the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation" of section 2511. 18 U.S.C. § 2511 (1) (c) and (d) (1970 & 1998 Supp.). A prerequisite to liability under this section is unlawful interception of a wire, oral, or electronic communication. *See Griggs-Ryan*, 904 F.2d at 119; *United States v. O'Connell*, 841 F.2d 1408, 1422 n.8 (8th Cir. 1987). Because plaintiff has failed to establish that his phone calls were unlawfully intercepted in violation of Title III, his claim that prison officials improperly used or disclosed the content of his conversations fails.

In accordance with the foregoing, the defendants' motion for summary judgment on the Title III claim is granted.

III. Conclusion

After careful review of the briefs and exhibits filed in support of the defendants' motions for summary judgment and the opposition and replies thereto, the Court concludes that the United States' motion for summary judgment on the

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[6] Because the Court concludes that the "consent" exception applies in this case, it does not address the defendant's claim that the "ordinary course" exception precludes liability under Title III.

Federal Tort Claims Act claim should be granted, that the Court lacks jurisdiction over the United States on the Title III claim because sovereign immunity has not been waived, and that Quinlan's motion for summary judgment should be granted on the Title III claim. Plaintiff's *Bivens* claim against Miller and Quinlan based on the First Amendment may proceed as the individual defendants are not entitled to qualified immunity.

An Order consistent with the foregoing is being issued contemporaneously herewith.

October 16, 1998

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge